

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-0446-CR-NM
98-0447-CR-NM**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER E. SMILEY,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Rock County:
JOHN W. ROETHE, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Roger E. Smiley appeals two judgments of conviction in these consolidated cases. He was sentenced to six years' imprisonment. The state public defender appointed Joseph L. Sommers to represent Smiley on appeal. Attorney Sommers has filed a no merit report with this court,

pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, STATS., and reports that a copy has been sent to Smiley. In compliance with *Anders*, both Attorney Sommers and this court informed Smiley that he could respond to the report, but he has not done so. After an independent review of the record as mandated by *Anders*, we conclude that any further proceedings in this matter would be without arguable merit. Smiley's convictions are affirmed, and we grant his counsel's motion to withdraw from further representation before this court.

BACKGROUND

In Appeal No. 98-0447-CR-NM, Smiley pleaded guilty to disorderly conduct as an habitual criminal (case one) and in Appeal No. 98-0446-CR-NM, Smiley pleaded guilty to felony bail jumping, and no contest to resisting an officer and possession of THC, all as an habitual criminal (case two). Case one arose on October 1, 1996, when Smiley was apprehended trying to enter a residence through a glass door. Smiley was intoxicated and naked. Case two arose on December 4, 1996, when police officers tried to remove Smiley from a tavern where he was creating a disturbance.

Both cases were consolidated for plea and disposition. As part of Smiley's plea agreement, numerous charges from these and other cases were dropped but read in for sentencing purposes. The circuit court adjudged Smiley guilty on the pleas, and sentenced him to six years in the Wisconsin State Prison System for bail jumping as a repeater, and to three terms of three years, each concurrent, for the remaining charges.

ANALYSIS

The no merit report discusses whether the guilty and no contest pleas were taken in accordance with Wisconsin law, whether the sentencing was proper and whether any other appellate issues were presented. We consider each of these issues. In addition, we independently consider whether Smiley had ineffective assistance of counsel.

Plea

Our review of the record satisfies us that Smiley's pleas were knowing, intelligent and voluntary, in accordance with *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The circuit court ascertained Smiley's mental condition and degree of understanding, and elicited that Smiley understood every element of every charge against him, as well as the possible maximum terms which could be imposed. The court also ascertained that Smiley understood that he was waiving constitutional rights, and that the court was not bound by the recommendation made by the State. The court requested trial counsel's opinion on whether Smiley was acting intelligently, knowingly and voluntarily. Finally, the court ascertained that no promises or threats had been made to induce Smiley's pleas. Under these circumstances, Smiley's pleas were entered knowingly, voluntarily and intelligently.

Sentencing

Sentencing lies within the circuit court's discretion. Our review is limited to whether the court misused that discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors which the court must consider are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 426-27, 415 N.W.2d at 541. The weight to be

given to each of these factors is within the court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The circuit court read and considered the presentence report, and the statements of counsel. The court considered Smiley's record, as well as charges which were dismissed, but read in for sentencing purposes. The court concluded that Smiley demonstrated a life-long pattern of alcoholism, that the DA's recommendation of two years' jail time would not address Smiley's problem, and concluded that six years of imprisonment was warranted to protect both Smiley and the public. This was a proper exercise of discretion under *Cunningham*.

Sufficiency of the Evidence

On the record, the court established the sufficiency of the evidence by ascertaining that both counsel and the defendant stipulated to a sufficient factual basis for the pleas. The court then accepted the complaints as the factual underpinning of the pleas. In our analysis, the court's procedure was proper and a sufficient factual basis was established.

Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel argument, Smiley would have to show that (1) his counsel's performance was deficient, and (2) that deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. *See also State v. Ambuehl*, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988). Here, Smiley originally faced six charges in these cases, as well as numerous charges in other cases. As a result of a plea bargain, the six charges in

these two cases were reduced to four, and the remaining charges in these and other cases were dropped. This result indicates competent representation. In addition, our independent review of the record reveals that trial counsel conscientiously argued on Smiley's behalf, was properly prepared for court, and consulted with his client at all appropriate occasions. Under these circumstances, there would be no merit to a claim of ineffective assistance of counsel.

Other Issues

No other issues remain for consideration, because, by entering guilty and no-contest pleas, Smiley has waived them. *State v. Aniton*, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994).

CONCLUSION

Based on our independent review of the record, we conclude that any further appellate proceedings would be without arguable merit, and would be wholly frivolous, within the meaning of *Anders*, as well as RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Sommers is relieved of further representing appellant Smiley in this appeal.

By the Court.—Judgments affirmed.

